



December 1, 2020

The Honorable Thom Tillis  
United States Senate 113  
Dirksen Senate Office Building  
Washington, DC 20510

*Re: DMCA Reform Bill Questions from Senator Tillis for Stakeholders*

Dear Senator Tillis:

The Internet Archive appreciates the opportunity to respond to your questions on potential reforms of the Digital Millennium Copyright Act (DMCA). We respectfully submit these responses to shed light on the issues we believe are key to the efficacy of the DMCA for all its stakeholders.

The Internet Archive is a 501(c)(3) non-profit library based in San Francisco, California. The Internet Archive works to provide universal access to all human knowledge by collecting, archiving, and providing public access to different types of digital materials. Many of these materials, consisting of websites, educational materials, music, software, images, books, video games, films, ephemera, and more, are uploaded by third-party patrons of the Internet Archive. These people – librarians, archivists, enthusiasts, collectors, and other members of the public – rely on the DMCA safe harbors to do so.

The COVID-19 pandemic has proven how essential the Internet is for functioning in a modern society. Just as Congress could not have anticipated how the DMCA would be used today, no one could predict just how much people would come to depend on the Internet. Laws and reform of laws that govern use and access to the Internet are thus a pertinent issue for all users, rather than a select few. One source reported that as of July 2019, 81% of American adults go online every day.<sup>1</sup> The same source reported in April 2020 that 53% of American adults deemed the Internet as essential and another 34% deemed it as important during the COVID-19 pandemic.<sup>2</sup> Americans rely on the Internet now more than ever for education, communication, shopping, handling financial matters, and working. Access to information is critical for all these purposes, and to the degree

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<sup>1</sup> See Andrew Perrin & Madhu Kumar, *About three-in-ten U.S. adults say they are 'almost constantly' online*, PEW RESEARCH CENTER (July 25, 2019), <https://www.pewresearch.org/fact-tank/2019/07/25/americans-going-online-almost-constantly/>.

<sup>2</sup> See Emily A. Vogels, Andrew Perrin, Lee Rainie & Monica Anderson, *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RESEARCH CENTER (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.

copyright policy impacts such access, it has implications far beyond just the balance of interests between rightsholders and internet service providers.

While Internet behemoths such as Google and Facebook dominate many discussions of Section 512, users who need access to information on the Internet also depend on much smaller non-profit organizations like the Internet Archive. Smaller providers generally agree that Section 512 is working well and serving its intended purpose. We worry that any changes to it will place a proportionally larger burden on us compared to larger platforms. Abrupt and untested new changes to Section 512 would be especially burdensome on the Internet Archive and our patrons, as they could generate tremendous uncertainty surrounding how they would apply to different classes of stakeholders, and potentially create new vectors for abuse of the notice and takedown system.

In particular, drastic changes to Section 512 could have disproportionately negative impacts on public service non-profits such as the Internet Archive and our patrons. The Internet Archive is first and foremost a library. We use technology and the Internet to deliver valuable services and collections to the public. The Internet Archive's goal of being a steward of knowledge is facilitated by the safe harbors, which shield us from liability for the occasional user who uploads infringing content, while allowing the vast majority of legal content to remain accessible.

Therefore, we provide these responses as an online service provider that hosts so-called "user generated content" and as a library with a mission to preserve and provide public access to cultural materials. In our view, while the DMCA system is not perfect, it generally works well and serves its intended purpose. As such, any substantial changes should be discouraged, including the controversial and untested "notice and stay down" system discussed in the Copyright Office report.

We look forward to further conversations on these issues.

**Question 1: The record established in my DMCA reform hearings indicated that an overarching principle of any reform should be making digital copyright less one-size-fits-all. The law needs to account for the fact that small copyright owners and small online services providers (OSPs) may have more in common with each other than they do with big copyright owners and big OSPs, respectively. Accordingly, I think we should consider whether copyright law should be revised to account for such differences among stakeholders. In particular, could copyright law borrow from employment law, or other relevant fields, to establish different thresholds for copyright owners and OSPs of different size, market share, or other relevant metric? If so, what is the best way to accomplish this? Is there a particular area of law, or existing section of the U.S. Code, that provides crucial guidance? As with all questions where it is relevant, please include in your response specific recommended legislative text.**

**Answer:**

The idea of dividing the world into “large” vs. “small” online service providers and copyright owners is intuitively appealing as a solution to some of the perceived problems with the DMCA. Other potential factors that might be of interest to consider could be the age of an organization, or whether the organization is a non-profit. However, it is unclear exactly what problems these changes would solve. Most of the large platforms such as YouTube and Facebook have already voluntarily developed technology and entered into agreements with large rightsholders in order to go above and beyond the requirements of the statute because it has been in their business interest to do so. YouTube’s much discussed Content ID program is just one such example. Smaller and non-profit organizations likely have not invested in these responses because they do not have the resources.

Mandating additional regulatory compliance once an organization reaches a certain threshold based on metrics such as number of employees or annual revenue could create incentives to game the system to stay on the “small” side of the line, which could in turn have an impact on economic growth and the labor market. Without serious study of the potential impacts of such changes, the potential for serious negative unintended consequences is high. The record on this subject has not been developed sufficiently to be able to tell at this time whether this proposal would be helpful.

**Question 3: Section 512 places the burden on copyright owners to identify infringing materials and affirmatively ask the OSP to remove the material or disable access to it. This burden appears to strike the correct balance, but the burden that the notice-and-takedown system itself places on copyright owners is too heavy; the system is also woefully inefficient for both copyright owners and service providers. I believe U.S. copyright law should move towards some type of a notice-and-staydown system—in other words, once a copyright owner notifies a service provider that a use of a copyrighted work is infringing, the service provider must, without further prompting, remove subsequent infringing uses absent a statement from the user (whether the copyright owner or not) that they believe the use is licensed or otherwise authorized by law (e.g., fair use). What are your thoughts on such a system, and how could it best be implemented?**

**Answer:**

The Internet Archive believes that adopting a notice-and-staydown system would be problematic in at least the following five ways:

First, it would remove human judgement from the process in many instances. In order to comply with a notice-and-staydown regime, every OSP would be required to either develop or purchase access to one or more automated filtering technologies, or manually review all material prior to upload. Manual, human review is impossible to scale, and therefore any organization working at Internet scale would be forced to invest in filtering technology, which blocks content according to an algorithm.

While technology can and should help organizations manage their notice and takedown system in certain ways, human judgment must remain a crucial part of the process on the side of the rightsholder and the side of the service provider.<sup>3</sup> Human judgment and participation in the notice and takedown process is essential for catching errors, pushing back on overbroad or abusive notices, and to help effectuate user protections. Takedown notices we receive regularly contain errors or are incomplete. We have listed a number of these issues in our response to Question 8.

We have also received DMCA notices that apply to a very small portion of a larger work, including comments on an archived message board or website guestbook, a poem on the homepage of an archived literary journal website, a quote in a yearbook, or album cover art that is mistakenly identified as a sound recording. We also receive frequent notices for materials that we have permission to archive, such as live concert recordings hosted at [archive.org/details/etree](https://archive.org/details/etree). Processing such claims generally requires understanding cultural context, using human judgment, and some amount of back and forth explanation and discussion with the notice sender to educate them about the status of the file at issue. In a “staydown” regime, the benefits of this human judgment would go out the window, resulting in the potential for serious suppression of non-infringing material and legitimate speech.

Second, adopting a notice-and-staydown regime threatens to undermine the user protections built into the DMCA and could result in broad censorship of the Internet. In cases where the OSP does not have the resources to develop their own, likely proprietary, algorithm, they will be forced to purchase or license technology from a vendor, and may not have any insight into how the algorithm works or why certain content is blocked. In such cases, the OSP would not be in a good position to communicate anything about the blocking back to the user who uploaded it. The current statutory scheme protects users who believe material they have posted was taken down in error in various ways, including through the counter-notification process. The counter-notification process makes little sense in cases where an algorithm automatically blocks material from being posted in the first place.

Third, filtering technology only works well for a very small set of media types - text, music, and popular movies. For most other media types, these algorithms are ineffective. Filters generally work by scanning the content of a file to be uploaded and matching that content to some copyrighted work, generally called “hash matching.” This type of technology does not work well for web-links. Bad actors can potentially get around a platform’s algorithm by simply posting a URL on the platform that, once clicked, will redirect users to another spot on the Internet that is not subject to the algorithm where the actual file lives. Users can thus still access the infringing content, just at another location on the Internet that is completely out of the original platform’s control. These algorithms

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<sup>3</sup> See *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016) (holding that rightsholders must consider whether a use of their work is a lawful fair use before issuing a takedown notice).

also do not work well for certain types of content, like photographs, which can easily make it through a filter or get wrongly caught up in one.<sup>4</sup>

Moreover, going back to the importance of human judgment, there is no computer algorithm that can determine the legal status of a particular file.<sup>5</sup> So, for example, if a photograph is initially uploaded by an infringer and then subsequently uploaded by a licensed user or a fair user, the filtering algorithm would be incapable of distinguishing between them. Under a staydown regime, the platform would be required to block all three uploads. Some rightsholders secretly “leak” content onto platforms to enhance interest in the content as a part of “stealth marketing” campaigns.<sup>6</sup> These campaigns are targeted at people who dislike rightsholder sponsored content, and involve making the uploads appear as though they were posted by a fan.<sup>7</sup> When there are marketing schemes deployed to make it appear as though an upload was not in fact posted by the rightsholder herself, how are the algorithms supposed to tell the difference? Both legitimate and infringing versions would likely get caught by the algorithm. All of this means that instituting a notice-and-staydown system would force many cases of legitimate uses off the web, causing further censorship of the Internet.

Fourth, a notice-and-staydown system would be costly and burdensome for service providers, especially those who are small or non-profit. These algorithm technologies are not something one can buy off an app store or from a retailer. They must be developed or licensed from software engineering companies and data science specialists, and require customization and significant ongoing upgrades and maintenance. YouTube alone spent \$60 million developing its Content ID system, which only works for audio and video content. Non-profits, libraries, and educational institutions who are defined as Internet service providers have scarce resources, even more so under COVID-19. These entities would be forced to use what little reserves they have to develop or license these technologies, or else be effectively forced to shut down any user generated content hosting services they provide.

Finally, we do not have any evidence as to whether “staydown” systems work at all. The Copyright Office reported that it does not have sufficient empirical evidence on the efficacy of staydown requirements from countries that have integrated them into their systems. The European Union might be the closest to adopting a staydown requirement that requires using algorithm technologies, but even the EU countries have until June

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<sup>4</sup> See, e.g., Daniel Foster, *Why do I see False Matches in my Pixsy Reverse Image Search Results?*, PIXSY (Mar. 3, 2016), <https://www.pixsy.com/reverse-image-search-false-matches/> (explaining how a false match might occur where a picture match software matches the image in question to the “preview” version of another picture, which might be vastly different than the full version of the picture, of where the falsely matched photo has some common elements with the first photo).

<sup>5</sup> See, e.g., Edward W. Felton, *A Skeptical View of DRM and Fair Use*, Comm. of the ACM (Apr. 2013), <https://cacm.acm.org/magazines/2003/4/6849-a-skeptical-view-of-drm-and-fair-use/fulltext?mobile%3Dfalse&sa=D&ust=1605481126222000&usg=AOvVaw0WXQNRgTWHpKdpb4i9cfTq>.

<sup>6</sup> Amir Hassanabadi, *Viacom v. YouTube-All Eyes Blind: The Limits of the DMCA in a Web 2.0 World*, 26 Berkeley Tech. L. J. 405, 430 (2011).

<sup>7</sup> *Id.*

2021 to implement such measures. In other words, there is just not enough information yet to determine whether the supposed benefits of such a system would outweigh the numerous burdens and costs outlined above. At a minimum, the prudent course of action for Congress would be to wait and see what evidence develops from jurisdictions that have invested in staydown approaches before rushing into unknown, burdensome, and potentially problematic new territory.

**Question 4: Starting from the place of the provisions that support the current notice-and-takedown system, a notice-and-staydown system would need to give more teeth to the knowledge standards and requirements for implementing a repeat infringer policy; to clarify that section 512(m)'s lack of a duty to monitor does not mean lack of a duty to investigate once notified and also that representative list and identifiable location do not require as much detail as courts have required; and to provide better mechanisms for users to contest a takedown as authorized by a license or by law. How would you revise or add to the existing provisions in section 512 to accomplish this or, if this could better be achieved by starting from scratch, what new legislative text do you think would best accomplish this?**

*Knowledge provisions:* We believe that the knowledge standards that would trigger a service provider's duty to expeditiously remove the allegedly infringing material should not be changed. The judicial interpretation of the red flag knowledge provision, which has been deemed to be triggered where there is knowledge of specific instances of infringement, is appropriate, and lowering the standard to require less than specific knowledge of infringement would be unduly burdensome on non-profit organizations like ours. Moreover, the standard has been settled for nearly a decade and is working well for the vast majority of takedowns. Statutory changes to the standard could be disruptive to all stakeholders, but especially to smaller organizations. At a time when Internet access is more essential than ever, introducing uncertainty into the Internet ecosystem can result in unintended consequences for all Internet users.

As a library, the Internet Archive cares about the usefulness and reliability of our collections. As such, we undertake good faith reviews of what is posted in our community collections. For example, our collection librarians may review collections for spam, malware or other harmful or unwanted material. Our librarians are not specialists in the nuanced analysis required to determine whether a work violates copyright law--this is the role of a specific group of professionals within the organization who are trained to respond to DMCA requests. Lowering the knowledge standards could disincentivize the type of quality assurance review that the Internet Archive and others undertake. Service providers might fear that a non-copyright expert employee would stumble on something that, unbeknownst to them, is potentially infringing and trigger a duty to remove the material which could inadvertently result in a loss of the service provider's safe harbor. Equally harmful is the overbroad removal of non-infringing items by untrained employees who are eager to protect the organization from risk.

*Repeat Infringer Policy:* In its adoption of the DMCA, Congress left open not only the question of what a “repeat infringer” is, but also what “appropriate circumstances” are. As such, service providers have come up with our own definitions of these terms to fit our particular circumstances. While we agree with the Copyright Office’s opinion, as stated in its report, that this creates a fair amount of uncertainty, we believe that it also permits some flexibility that has advantages.

Our community includes hundreds of volunteer archivists who actively seek to preserve at-risk websites, software, old audio recordings, home videos, and other older materials whose commercial life (if they ever had one) is long past. We regularly take down current commercially viable materials, and terminate the accounts of users who repeatedly or flagrantly post such materials. But we have no desire to unfairly punish users who either made a genuine mistake in circumstances where rights were unclear (e.g., we received notices after the *Golan v. Holder* decision removed certain materials from the public domain retroactively) or users who post materials in a manner that may be a fair use but choose, for whatever reason, not to contest a takedown notice. In other words, we believe that good faith efforts by users to share important cultural or political materials should not be punished, and we believe the Internet Archive reflects and accounts for that in ways that may be different for other providers who are operating under different circumstances or with different materials.

There is a difference between intentional commercial infringement and innocent noncommercial infringement. The copyright damages system takes this difference into account, ranging from “innocent” to “willful” infringement. We believe that a properly implemented repeat infringer policy must take these considerations into account as well, under the auspices of “appropriate circumstances.” The current statutory scheme allows us to take these considerations into account.

*Representative List and Identifiable Location Provisions:* The representative list and identifiable location provisions have been interpreted together--appropriately so--to mean that works can be described representatively, but identification of the infringing material must include reasonably sufficient information for an OSP to locate the material. The representative list and identifiable location provisions require some effort on the part of rightsholders so that OSPs can act on takedown notices. At minimum, a takedown notice must contain enough information that an OSP with no knowledge whatsoever of the identified works is able to identify the works and take appropriate action. A federal district court has held that a notice that merely provides an overly generic representative list (e.g., stating “all works by one artist”) without providing the works’ location would force an OSP to violate § 512(m) in its efforts to take down these works.<sup>8</sup>

The same court held that, by contrast, URLs are an example of information sufficient to locate infringing material under the identifiable location provision.<sup>9</sup> The Internet is a

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<sup>8</sup> *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 528-29 (S.D.N.Y. 2010).

<sup>9</sup> *Id.* at 529.

location-based resource, and URLs are the Internet's precise location "coordinates" for each piece of content on the internet. URLs are the lifeblood of the Internet. We believe URLs to be the best way to locate any potentially infringing material in takedown notices.

The Internet Archive can and does work with takedown notices that do not provide URLs so long as they provide some reasonably sufficient identifying information. For example, takedown notices that provide ISBNs or DOIs may allow the Internet Archive to specifically identify works in certain formats, but it generally takes us longer to process these notices than those that contain URLs. The process may take even longer if the notice also does not contain specific identifiers such as ISBNs and DOIs.

Another prevalent factor in takedown speed and correctness is the accuracy of the metadata in uploaded content. For example, if a notice does not provide URLs, ISBNs, and/or DOIs but instead relies on user-submitted metadata, the identification process may be difficult, slow, and imprecise. Not all metadata is created equal. Metadata comes down to how the user inputs it and the metadata can be incorrectly inputted by users who upload content inadvertently or intentionally. Takedowns based on user generated metadata could also not be perfectly accurate because there is not enough specificity in the notice for us to locate every claimed work.

Conditioning safe harbor protection on perfectly accurate takedowns from such unspecific notices would be a misstep. Permitting rightsholders to send vague, unspecific takedown notices would also be a misstep, and would unduly burden OSPs like the Internet Archive who are making good faith efforts to comply with the requirements for safe harbor protection. Thus, courts' general requirements for the details of a representative list and identifiable location in notice should not be diminished.<sup>10</sup> Lowering these requirements would force the Internet Archive into a position of heightened risk of losing the safe harbor protection as our small staff combing through notices with less detail and perhaps material with incorrectly inputted metadata would inevitably result in inaccurate or untimely takedowns. A representative list that provides identifiable locations for each claimed work in the form of URLs is the best way to ensure that OSPs can most accurately process takedown notices to protect themselves and rightsholders' interests.

**Question 6: It is clear from the record established across my hearings that one major shortcoming of section 512 is that users who have had their content removed may decide to not file a counter-notice because they fear subjecting themselves to federal litigation if the copyright owner objects to the putback. At the same time, the requirement that a copyright owner pursue federal litigation to keep a user from having content put back up following a counter-notice is a heavy burden. Congress**

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<sup>10</sup> See, e.g., *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010); *Arista Records, Inc. v. MP3Board, Inc.*, 2002 U.S. Dist. LEXIS 16165\* (S.D.N.Y. 2002); *Perfect 10, Inc. v. Giganews Inc.*, 993 F.Supp. 2d 1192 (C.D. Cal. 2014).



**might consider improving dispute resolution by directing disputes between notice and counter-notice filers to a small claims court rather than federal court. What is the best way to accomplish this? Would the copyright small claims court as envisioned by the CASE Act be the proper forum? If not, how should such a tribunal be designed? Related, what should be the time period for putbacks? There is broad agreement that the current 10-14 day window works poorly for both copyright owners and users. How would you amend this?**

**Answer:**

Dispute resolution through a small claims court, as envisioned by the CASE Act, is not the answer. We recognize the good intent behind reducing barriers to copyright enforcement for rightsholders with limited financial resources. However, the CASE Act will not work in a way that will actually help small and medium-sized rightsholders enforce their rights and it does not significantly alleviate the fears or burdens of users. What the CASE Act seeks to do could also be unconstitutional, as it would place infringement claims in a non-federal court forum despite copyright law indicating that doing so would be inappropriate.<sup>11</sup> If created, the flaws of this small claims process would effectively allow the chilling of protected expression and abuses of Section 512 that exist today.

The CASE Act would establish a copyright small claims tribunal within the Copyright Office, which would have the authority to hear and decide infringement claims. However, there is no guarantee that the Copyright Office would provide the same due process and other protections that federal courts offer. Well-resourced entities would likely become repeat players who would have a sizable advantage over smaller or poorer parties, tipping the scales out of balance. Even more concerning is how the CASE Act limits the ability to seek review of a tribunal's decision in federal court only to cases of fraud, corruption, misrepresentation, or other misconduct. This immunity from appellate review should not be given to any process that adjudicates legal rights. The tribunal would not be limited to small and medium-sized rightsholders, so large corporations and copyright trolls could abuse the system by bypassing courts to receive quick and excessive damage awards. Smaller rightsholders would therefore be further harmed as the tribunal would be flooded with such opportunistic claims rather than focusing on the people who would benefit the most from a small claims process. We have seen similar problems emerge in so-called "copyright troll" litigation. The tribunal also would not be limited in the types of copyright claims it could decide, leaving it open to cases far more complex than simple infringement claims. Cluttering the small claims process with copyright cases that the tribunal would not be able to effectively handle would also hurt smaller rightsholders and users defending their use of copyrighted works.

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<sup>11</sup> See e.g., U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 8-9 (2013), <https://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>, (citing 17 U.S.C. § 301(a); 28 U.S.C. § 1338(a)).

While the CASE Act theoretically allows people who receive notice of a claim through its process to opt out of tribunal proceedings, the requirements of opting out are vaguely described as being in accordance with the regulations the Copyright Office will create. These regulations may be too complicated for people not well versed in law or without easy access to lawyers, and opting out could be an extremely troublesome process. Lack of knowledge on complex copyright laws should not lead to the unfair penalization of Internet users. And yet, that is exactly what the CASE Act imposes on users, as it allows for heavy statutory damages of \$30,000 even in cases disproportionate to the offense, such as alleged copyright infringement when the copyright is not even registered prior to the alleged infringement. Many legitimate users of copyrighted works could be unfairly exposed to liability of devastating stakes, with little chance to appeal. The Internet Archive cooperates with rightsholders enforcing their copyright, but as a library and a community that values both creative works and access to information, we do not approve of how the CASE Act approaches these concerns.

**Question 7: More generally, the notice- and counter-notice sending process have many shortcomings. These could be improved by clarifying when automation is appropriate and that OSPs cannot erect requirements beyond those in section 512(c)(3); by authorizing the Copyright Office to develop standardized web forms for notices and counter-notices and to set regulations for the communications that OSPs must deliver to a user when their content is taken down or had access disabled (including offering information about the fair use doctrine as codified in section 107 and as illustrated in the Copyright Office's Fair Use Index); and by increasing privacy protections for notice and counter-notice senders by masking certain personally identifiable information, including address and phone number. How could this best be done? Please provide specific provisions for accomplishing these goals.**

**Answer:**

While the Internet Archive does receive a fair amount of inaccurate and incomplete notices, we do not believe that the legislating of mandatory standardized notice and counter-notice forms is the correct way to address the issue.

The Internet ecosystem thrives on its diversity. Different platforms have different goals and provide service to their users through different means, interfaces, and devices. Legislating mandatory standardized forms for notices and counter-notices will thus not serve every rightsholder, provider, or user, equally. The information that would be useful for the Internet Archive to receive in order to expeditiously remove any potentially infringing work might not be the information that is useful for YouTube or some other platform. Likewise, an institutional rightsholder with more experience in copyright law might understand the need to provide more or less information in a notice given the particular circumstances of the work and use at issue, as compared to the information a new rightsholder would think is appropriate to provide. These needs are quite contextual

and hard to anticipate. It would be counterproductive to try to force a “one-size-fits-all” form on the vast and diverse internet ecosystem.

Moreover, the adoption of standardized forms for notices and counter-notices would further remove human judgement from the notice and takedown system. Based on over 20 years of experience handling notices, we have found that one of the most efficient and productive approaches to notices is to use them as an opportunity to start a dialogue between the notice sender, the platform that receives the notice, and the user who uploaded the content at issue. It is usually through these conversations that, for example, the service provider can understand the full scope of the notice sender’s rights in the work, or learn of a user’s right, privilege, or license to use the work. These conversations can sometimes lead to a discussion surrounding whether the use of the work can constitute fair use, an issue that might not be fully appreciated by the user of the material or the rightsholder at the moment the notice is sent. These conversations are therefore very important to help mitigate the bringing of resource-draining and frivolous litigation.

As a library, these types of human conversations, which reveal more relevant facts about a use of a copyrighted work, are especially important to us. Libraries are meticulous record keepers, and ensuring the accuracy and legitimacy of our collections is a top priority. The dialogue we engage in with notice and counter-notice senders helps us better understand the works we have in our collections and fine-tune the records we keep. Adopting ill-fitting standardized forms in an effort to expedite takedowns has the potential to generate mistakes in the takedown process and deter dialogue. We should therefore not sacrifice the valuable communication that the current notice and counter-notice system fosters in order to hasten the takedown process.

**Question 8: At the same time that Congress should revise section 512 to ensure that infringing material stays down once identified, it should also discourage the over-sending of notices as a counter-balance to the more significant action that an OSP must take after receiving a notice. This could be done, for example, by heightening the requirements for accuracy in notice sending, possibly with stricter requirements and heavier penalties. As noted above, the standard may be more lenient for small entities and individuals. How might the requirements be heightened in a meaningful way while not unduly burdening copyright owners trying to protect their work against infringement?**

**Answer:**

We believe that the current statutory scheme does not do enough to deter the sending of inaccurate, improper, and incomplete notices, or enough to incentivize the sending of accurate, and well-formatted notices.

We regularly receive a high number of inaccurate, improper and incomplete notices. From what we are able to tell, a large proportion of the improper or incomplete notices come from third-party companies who send automatically generated notices on behalf of

major studios, record labels, or publishers. Some examples of the types of improper notices we have received include:

- Notices that mistakenly identify works that are in the public domain. For example, we have received notices that mistake volunteer-produced audio recordings of classic public domain works such as *Jane Eyre*, *Sense and Sensibility*, Bram Stoker's *Dracula*, *Moby Dick*, and *Little Women* for commercial audiobook editions.
- Notices that use loose keyword matching and consequently overclaim works that are clearly not owned by the major content holders they represent. For example, we received a takedown notice regarding an old Salem cigarette commercial based on the term "Salem," which is also the title of a major television series. Similar keyword misidentifications frequently show up as "matches" for music, concerts, home movies, and public domain books.
- Notices sent regarding reviews or lesson plans about a given work, rather than the work itself. For example, we received a takedown notice regarding a lesson plan from the Department of Education about *To Kill a Mockingbird*. Similarly, Warner Brothers has sent takedown notices for reviews of films and television programs mistaken for the works themselves.
- Notices containing malformed URLs that do not point to any existing materials on our system.
- Notices that improperly seek removal of materials bearing a Creative Commons license
- Repeated notices for materials weeks or months after they have already been removed and notice of such takedown had been sent to the claimant.
- Notices containing valid URLs that point to a catalogue record for a particular title, but where no book is available in our system.
- Notices sent regarding print-disabled access-only works, which are legally available only to Internet Archive users with disabilities that interfere with the ability to read printed text, such as blindness, low vision, and dyslexia. These users must have an Internet Archive account that is qualified by approved organizations to gain access to these Internet Archive services.

We will sometimes receive third-party notices lists of hundreds of URLs, many or most of which are mistakenly identified as infringing in one of the above-mentioned ways. For instance, we received a notice in June 2020 that identified 212 URLs to books, of which 21 (10%) were mistaken for different works, 100 (47%) were only catalog listings that contained no content, and 8 (4%) were available only to people with authorized print-disabled access. Hence, only 83 of the 212 URLs (39%) were disabled in response to the notice. Additionally, we received a notice in September 2020 that identified 224 URLs to books in our system, of which 70 (31%) were mistaken for different works, 57 (25%) were only catalog listings that contained no content, and 78 (35%) were available only to people with authorized print-disabled access. Additionally, 8 (4%) of the URLs

had been previously taken down. Hence only 11 (5%) of the URLs were disabled in response to the notice.

Although the DMCA notice and takedown process is supposed to be limited to alleged violations of copyright, notices sometimes include additional and vague threatening language regarding rights other than copyright. For example, Web Sheriff's notices often include a clause that says: "Infringed Rights: COPYRIGHT / PERFORMERS' RIGHTS / MORAL RIGHTS / RIGHT-OF-PUBLICITY / PERSONAL GOODWILL & REPUTATION / BUSINESS GOODWILL & REPUTATION / CONSUMER PROTECTION RIGHTS as applicable." We often get notices seeking to use the DMCA process to address trademark, privacy, and defamation, among other non-copyright issues. Higher standards for takedown notices could reduce the burden on our small staff in having to clarify or otherwise process these notices.

Moreover, the law is structured to incentivize taking materials down, rather than leaving them up, even when the situation as presented by the notice we receive is unclear. Any time we receive a DMCA takedown notice and decide not to take the material down for any legal reason, we risk our safe harbor protection. While a user may file a counter-notice if they believe we took their work down in error, many users are often not in a position to do so. In the last decade, the Internet Archive has received a total of only eight counter-notices, compared to the thousands of takedown notices it has received. Most users lack the resources to fight a legal battle in court should the copyright holder decide to file suit, even in cases where the users would ultimately prevail. Being in the legal right does nothing to change that users may not be able to afford litigation or fighting back against bad copyright actors. Some commercial platforms such as Google and Automattic have been able to stand up for their users in court, and we applaud them for doing so. However, many platforms—especially non-profit libraries—will never be in a position to be able to take bad copyright actors to court.

Such conditions are inefficient and harmful, and they merit change. More educational resources could help reduce the abuse of the notice and takedown system according to the Copyright Office. However, it is likely that bad copyright actors will continue their behavior, given the lack of disincentives. Perhaps a provision that allows for statutory damages to be collected for false notices can help deter this behavior.

It might also make sense to create a provision in the law that would grant the service provider the ability to refuse to take material down when they have a reasonable, good faith belief that the material identified in a DMCA notice is non-infringing. For example, if a work appears to be in the public domain, or if the use of the material appears to be a fair use, then the service provider could refuse to take the material down without risking the imposition of statutory damages.

**Question 9: Though section 512 says that OSPs must accommodate standard technical measures (STMs), no such measures exist after more than twenty-two years, and some stakeholders have complained that service providers have no**

**incentive to establish STMs. The Copyright Office could help here, if Congress provided regulatory authority to adopt STMs and promulgate related regulations. How broadly or narrowly should the scope of this authority be defined?**

**Answer:**

Congress should not provide the Copyright Office regulatory authority to adopt STMs and promulgate related regulations.

First, it is worth noting that there may be very good reasons why no STMs exist after 22 years. There is insufficient evidence and study to understand these reasons, which may be technological, economic, or political. Thus, before any new authorities are granted, we should seek to understand this history better. For example, STMs might fail to develop because technological innovation might be happening too quickly to standardize, or standards are too expensive, or committing to certain standards would concentrate too much power in the hands of the firms who control those standards.

Second, there are concerns with institutional competence. While the Copyright Office has made great strides in its understanding of some aspects of digital copyright, it is not an expert agency in communications or network technology, both of which would be necessary to help guide the development of STMs that work for all stakeholders, if that was even possible. The technology industry itself, with the relevant expertise in the area, has been unable to agree on what an STM should look like. Without the technical expertise necessary to develop effective STMs to work in conjunction with the notice and takedown system, the Copyright Office could end up creating STMs that are impractical, inefficient, or obsolete.

Moreover, granting the Copyright Office authority to adopt what, in its view, is the right kind of STM that all service providers must accommodate is tantamount to a government technology mandate. This type of mandate would have the effect of suppressing competition and innovation at the intersection of the technology and copyright sectors. The fact that there has not yet been broad consensus on appropriate technical measures is an indication that competition and innovation in this area is working properly, with different players looking to adopt increasingly better measures that can garner the support of more and more service providers. Turning this entire process over to the Copyright Office could stop this innovation and competition in its tracks. Core statutory language of section 512 also inherently conflicts with a government imposed technology mandate, as it established that a standard technical measure must be developed under “a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.”<sup>12</sup> A mandate would remove the flexibility afforded by this language to find solutions from what should be an open, fair, voluntary, and multi-industry cooperation.

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<sup>12</sup> 17 U.S.C. § 512(i)(2)(A).

**Question 10: One concern with the voluntary agreements that copyright owners and OSPs adopt to supplement section 512 is that third-party interests are not often represented in the agreements. That can lead to concerns that certain copyright owners may be shutout from utilizing an OSP or including their works in an OSP's monetization program, or that the speech of specific users and consumers may be censored. I am interested in protecting these interests possibly by allowing for regulatory review to ensure that voluntary agreements do not prohibit uses authorized by law (e.g., fair use) or otherwise unduly burden third parties, including copyright owners not party to an agreement. What would be the best format for such regulatory review? And since these agreements may implicate areas of law outside copyright, such as antitrust, who is best suited to handle such review: Federal Trade Commission, Department of Justice, or Copyright Office?**

**Answer:**

The Internet Archive is a non-profit library and does not have a “monetization program.” Access to our library collections is free to the public. The question expresses concern for copyright owners who may be left out but fails to mention the ways in which private agreements tend to strip rights away from libraries, our patrons, and Internet users in general. For example, ebook licenses generally eviscerate ownership and free expression rights for patrons, libraries, and the general public under very restrictive terms. These licenses are not the equivalent of a purchase--the fine print makes it clear that they are precisely the opposite.

In many cases, the terms are so limited that libraries and their patrons are restricted from the very uses, exceptions, or exemptions made legal in the Copyright Act. Here is an example of one of the more common licensing clauses:

*“Except as explicitly authorized in this License, you agree not to archive, download, reproduce, distribute, modify, display, perform, publish, license, create derivative works from, or use content and information contained on or obtained from the Work....” and “articles, chapters, and other materials made available via this License may not be used for the purpose of interlibrary loan...”<sup>13</sup>*

This license takes away nearly all the copyright exceptions for libraries, and many exceptions for the public as well--uses that Copyright law would otherwise allow. For example, document delivery, interlibrary loan, and digital preservation are empowered by 17 USC § 108 but the above license language forbids those common library activities. Similarly, fair use, 17 USC § 107, allows libraries and library patrons to engage in many of the activities forbidden by the license, so long as it meets the statutory balancing

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<sup>13</sup> See Kyle K. Courtney, *Libraries Do Not Need Permission to Lend Books: Fair Use, First Sale, and the Fallacy of Licensing Culture*, (May 18, 2020), <https://kylecourtney.com/2020/05/18/libraries-do-not-need-permission-fair-use-first-sale-and-the-fallacy-of-permission-culture/>.

requirements.<sup>14</sup> The above license text is indicative of the general trend by large publishers to eliminate as many of the rights of users and libraries as possible. Copyright owners should not be allowed to undermine the carefully considered balance of our copyright system through the fine print of private license agreements.

Congress therefore must recognize that the fundamental rights enjoyed by users and civic institutions like libraries--especially those codified at 17 USC §§ 107, 108, 110, and the counter-notice procedures in § 512--cannot be contracted away, under any circumstances, personally or by third parties.

**11. Section 1201 currently allows for temporary exemptions to be granted from the circumvention prohibition, but those exemptions do not extend to third-party assistance. This means that when the Librarian of Congress grants an exemption for circumvention of technological protection measures (TPMs) over software for a tractor to allow for repair, the tractor owner must perform the software repair themselves. The Copyright Office has recommended amending the statute to grant the Librarian authority to adopt temporary exemptions permitting third-party assistance “at the direction of” an intended user, and this may be the right way to address this problem. Do you agree with the Copyright Office?**

**If so, how should this provision be drafted to avoid unintended consequences, and to what extent is the Unlocking Consumer Choice and Wireless Competition Act a helpful model? If not, please explain why you do not agree and provide specific recommendations as to how you think this problem should be addressed?**

Please see consolidated response to Questions 11-14 below.

**12. The Copyright Office has recommended revising some of the permanent exemptions so that they are better tailored to the types of uses sought today. In particular, the exemptions for security testing and encryption research should be revised to expand the types of activities permitted, ease the requirements to seek authorization from the owner of the relevant system or technology, and eliminate or clarify the multifactor tests for eligibility. What thoughts do you have about revising these existing permanent exemptions, and how would you recommend that be done?**

Please see consolidated response to Questions 11-14 below.

**13. Congress should adopt new permanent exemptions for noninfringing activities that have repeatedly received exemptions in recent triennial rulemakings, or where there is a particularly broad-based need, including to enable blind or visually impaired persons to utilize assistive technologies and to allow diagnosis, repair, or maintenance of a computer program, including to circumvent obsolete access controls. What other temporary exemptions should be made permanent?**

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<sup>14</sup> See e.g., *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d. Cir. 2014) and *Cambridge University Press v. Becker*, (N.D.G.A. 2020).



Please see consolidated response to Questions 11-14 below.

**14. There are various ways that the triennial rulemaking process could be streamlined to be more efficient and so that section 1201 better accounts for user concerns. These include establishing presumptive renewal of exemptions adopted in the previous rulemaking cycle, shifting the burden to those who want to oppose an exemption from the previous rulemaking, and authorizing the Librarian, upon recommendation of the Register, to make permanent a temporary exemption that has been renewed twice without opposition and without modification. How ought section 1201 be revised to reflect the stakeholder desire for a less burdensome triennial rulemaking process and consumer interests, and what other means should be adopted to make the rulemaking process more efficient?**

As we understand it, the original purpose of Section 1201 was to support the digital marketplace for copyrighted works by restricting the circumvention of technical measures used to “protect” those works. However, it is time to recognize that Section 1201 has not been effective at achieving this goal, but instead has had an outsized chilling effect on legitimate activities, including those performed by libraries and archives.

Section 1201 creates a complicated and uncertain environment for libraries and archives. Archivists have a legitimate mission to preserve history for the long-term benefit of society. In so doing, archivists rely on the fair use doctrine and other copyright limitations provided by Congress to preserve materials without fear of liability for copyright infringement. And yet, Section 1201 implies that the preservation of “protected” materials may nevertheless be a violation of the law.

The triennial rulemaking process is the mechanism that supposedly can be used to overcome the uncertainties around the conflicts of Section 1201. The Internet Archive has not been in a position to participate in this process because it is burdensome and as a small non-profit, we lack the resources to do so. Moreover, it is not always feasible to wait three years for a possible exemption to Section 1201 when the digital history we pledge to preserve may have disappeared by then. Moreover, the idea that we would have to seek the same exemption over and over again is a non-starter.

Section 1201 needs serious recalibration to protect legal uses of in-copyright works. A few simple approaches exist. Section 1201 could require a nexus between circumventing behavior and copyright infringement, as proposed in the bill sponsored by Representative Zoe Lofgren and Senator Ron Wyden. Another would be to exempt libraries and archives from Section 1201. Perhaps the simplest recalibration of all would be to repeal Section 1201 altogether.

Yours respectfully,

Lila Bailey, Internet Archive Policy Counsel